FILED
AUG 4 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1119

INDIANA EMPLOYMENT SECURITY DIVISION, JOHN F. COPPES, individually and as Director of the Indiana Employment Security Division; VAN SMITH, MAX WRIGHT, and ALBERT SUMMERS, individually and as members of the Indiana Employment Security Board, KENNETH M. SWAIM, individually and as Manager of the Fort Wayne Branch of the Indiana Employment Security Division,

Appellants,

-VS-

ESSIE B. BURNEY,

Appellee.

Appeal from the United States District Court for the Northern District of Indiana, Fort Wayne Division

BRIEF OF APPELLANTS

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OPINIONS BELOW

The opinion of the United States District Court and its order denying appellant's Motion to Amend the judgment have not been reported. They are set out in the Jurisdictional Statement at pages A-1 through A-12.

JURISDICTION

The basis of the jurisdiction of this Court over this appeal is 28 U.S.C. § 1253, providing for appeal directly to this Court in cases required to be heard and determined by a district court of three judges.

The District Court entered its Memorandum of Decision on October 27, 1971. (App. 3-4). Appellants (hereafter referred to as the Division) filed a motion to amend the Decree and Injunction, pursuant to Federal Rules of Civil Procedure, Rules 59(e), 60(b)(6), and 65(d), on November 8, 1971. (App. 4, 34-43). This Motion was denied by the District Court on November 29, 1971. (App. 48). Notice of Appeal was filed on January 3, 1972. (App. 5). This appeal was docketed on March 2, 1972, and probable jurisdiction noted on May 30, 1972.

STATUTORY PROVISIONS

The statutes involved in this appeal are 42 U.S.C. § 503 and Indiana Code of 1971, 22-4-17-2. Because of their length, these provisions are set out in Appendix A hereto.

QUESTIONS PRESENTED FOR REVIEW

1. Whether an unemployed person receiving benefits under the Indiana Employment Security Act, after having been determined to be an insured worker and having been found eligible for benefits for certain weeks, may be determined to be ineligible for benefits for later weeks by reason of failure to meet eligibility standards during periods after the initial determination, without a "prior due process hearing."

2. If it be determined that such a hearing is required, whether the type of hearing required is a full, adversary, evidentiary hearing or an informal hearing process by which all interested parties are informed of the issues and the alleged facts upon which a determination of ineligibility would be made and are allowed to present such infor-

mation and explanation as they see fit, but without the formal requisites of a trial-type hearing.

STATEMENT OF THE CASE

On or about January 7, 1971, Appellee Essie B. Burney was determined to be eligible for unemployment compensation benefits as a result of the termination of her previous employment. She received benefits of forty dollars per week until March 26, 1971, at which time her benefits were suspended. During a regularly scheduled interview on March 24, 1971, she informed the Division's claims deputy that she was available only for first shift work. For that reason she was ruled not to have been available for work for the week ending March 27, 1971, and for future weeks until such time as she should enter the labor market and become available for all shifts of work. (App. 30-32).

On April 27, 1971, Mrs. Burney filed a Motion to Intervene as Plaintiff and Complaint of Intervening Plaintiff in an action previously filed as a class action against the Division. (App. 15-23). That action, heard by a three-judge court, had sought to declare invalid the Indiana statutory provision that a recipient found to be eligible by the Division would have his benefits suspended upon an appeal by the employer of that determination. (App. 7-14). That original issue was decided on the authority of this Court's decision in *California Department of Human Resources Development v. Java,* 402 U.S. 121 (1971), issued while this action was pending in the District Court, and is not an issue on this appeal.

On May 7, 1971, the District Court granted Mrs. Burney a temporary restraining order requiring the division to reinstate her benefit rights and not again suspend or terminate them "without a prior, due process hearing." (App. 2).

Mrs. Burney was granted a hearing before an appeals referee on July 1, 1971, and on July 13, 1971, the referee

affirmed the ruling that Mrs. Burney was ineligible. (App. 31).[1]

On September 21, 1971, Mrs. Burney moved for summary judgment (App. 27-28), which motion was granted and judgment entered on October 27, 1971. (App. 3-4, Jur. Stat. A-1—A-11).

The Division filed on November 8, 1971, a motion to amend the injunction to specify that the type of hearing required be the California determination procedure approved by this Court in *Java*.[2] (App. 34-43). A memorandum in opposition to the motion was filed, arguing that a formal, adversary, evidentiary hearing be required. (App. 44-47). On November 29, 1971, the District Court entered an order denying the Division's Motion. (App. 48). Notice of Appeal was filed on January 3, 1972. (App. 5).

SUMMARY OF ARGUMENT

Under Indiana law, a separate determination of eligibility must be made each week because the law requires that a claimant must exhibit a specific course of conduct during that week. Thus, it is incorrect to refer to a determination of ineligibility for a certain week as a "termination" or "suspension" of benefits.

The Indiana system fulfills the requirement of paying benefits "when due," since each week's claim is a separate one requiring an initial determination. A finding that a claimant is ineligible for that week is a determination that benefits are not due.

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[1] Mrs. Burney then appealed the referee decision to the Review Board of the Division, which on December 6, 1971, after the judgment of the District Court, reversed the referee decision.

[2] This Motion, timely filed under Federal Rules of Civil Procedure, Rule 59(e), suspended the time for appeal so that the Notice of Appeal, although filed more than sixty days after the filing of the Memorandum of Decision, was still timely to preserve the right to appeal therefrom. 6A *Moore's Federal Practice*, § 59.12(2) and cases there cited.

This court's decision in the *Java* case is not applicable to the facts of this case. The basic rule of that case is that an interested party—in that case, the employer—cannot require reversal of the deputy determination pending appeal. That rationale supports the position of the Division in this case.

This Court's decision in *Goldberg v. Kelly* is inapplicable because the welfare programs considered there operate on a theory different from that of unemployment compensation. Moreover, *Goldberg* involved termination of a vested, predetermined right, while this case involves an initial determination.

All these factors were considered in the case of *Torres v. New York Department of Labor,* in which a decision for the state agency was affirmed by this Court. This case is indistinguishable from *Torres.*

The injunction in this case requires a "prior, due process hearing." The phase is not defined. A request for clarification was denied. The injunction is so vague as to be unenforceable.

The Indiana procedure is basically similar to the California procedure discussed favorably by this Court in *Java,* with modification to deal with the circumstances of continued claims.

Claimant has urged a proceeding based on *Goldberg v. Kelly* which would require a full trial or at least deferral until the referee hearing.

Due process requirements vary to fit the particular circumstance. The concern of the division is to provide a reliable system that will be flexible and informal enough to deal with the number of claims involved. The present Indiana system meets those requirements.

ARGUMENT

I

An Administrative Determination of the Eligibility of A Claimant for Benefits is Permissible.

The District Court in this case declared invalid, as contrary to the Social Security Act, certain provisions of Indiana law which set out the procedures used by the Division to determine the eligibility of claimants for unemployment compensation benefits. The relevant portion of the District Court decree is as follows:

> "4. Further, the defendants, their successors in office, their agents and employees are enjoined from terminating, withholding, suspending and reducing the unemployment compensation benefits of plaintiff Burney and members of the class, who have been determined eligible and subsequently ineligible pursuant to an administrative decision, without a prior due process hearing."

The authority cited by the District Court was this Court's decision of *California Department of Human Resources Development*, 402 U.S. 121 (1971). These statutes and *Java* will be examined.

A.

THE INDIANA LAW

The basic Indiana statute controlling the determination of eligibility is Indiana Code of 1971, 22-4-17-2, as set out in Appendix A of this brief. Under the statute, a person who is unemployed makes an initial claim for benefits, at which time his status as an "insured worker" is determined. An "insured worker" is defined as one who has earned the required amount in wage credits. Indiana Code of 1971, (I.C. 1971) 22-4-2-25, as found in Ind. Ann. Stat. (Burns 1964 Repl.) § 52-1526x. At that time, the Division also makes a determination of eligibility for the first week of benefits.

Under the Indiana Statute, as is common among the unemployment compensation laws of the various states, eligibility is determined on a week-by-week basis. I.C. 1971, 22-4-17-2(d) provides as follows:

> "In addition to the foregoing determination of insured status by the Division, the deputy shall, throughout the benefit period determine the claimant's eligibility with respect to each week for which he claims waiting period credit or benefit rights, the validity of his claim therefor, and as the case may be the attributability to the employer of the cause for which the claimant left his work. . . ."

For purposes of analysis, weekly claims may be distinguished into initial claims, which are determinations of eligibility for the first week, and continued claims, which are determinations of eligibility for subsequent weeks.

This classification is based on a consideration of the requirements for eligibility which may similarly be divided into two groups. The first deals with the circumstances surrounding the termination of the prior employment, such as whether the claimant is out of a job because of a lack of available work, or because of misconduct, or because the claimant may have quit his job voluntarily not for good cause attributable to the employer. That determination is ordinarily made on the initial claim and not redetermined at that level.[3]

Either the Claimant or employer may appeal the deputy's decision to a referee for determination de novo.

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[3] Cf. *Torres v. New York State Department of Labor et al.*, 321 F.Supp. 432 (U.S.D.C., S.D.N.Y. 1971); remanded to the District Court, 402 U.S. 968 (1971). reinstated with further opinion, 333 F.Supp. 341 (1971); affirmed — U.S. —, 92 S.Ct. 1185 (1972). In that case the initial request for information to the employer was incorrectly addressed and never received. Under such circumstances, a redetermination of the termination issue was allowed and would indeed appear mandatory to provide due process to the employer, whose account was being charged.

The second group of issues deal with the claimant's activities during the period of unemployment and must be determined weekly. The greatest number of disputes in regard to these issues arise from the requirements of I.C. 1971, 22-4-14-3, as found in Ind. Ann. Stat. (Burns 1971 Supp.) § 52-1538b, which states in relevant part:

> "An unemployed individual shall be eligible to receive benefits with respect to any week only if he is physically and mentally able to work, is available for work and is found by the Division to be making an effort to secure work."

And, of course, there are also continuing requirements that the claimant still be unemployed and that he register for benefits. A determination of ineligibility for a certain week may, depending on the issue involved, affect only the claim for that specific week or may carry with it a penalty of suspension of benefits for future weeks.

Such weekly determination of eligibility is essential, because of the affirmative duties placed on a claimant. He must demonstrate certain conduct each week to be eligible for benefits for that week. It is a physical impossibility for the Division to determine in the first week whether a claimant will, for example, be available for work in the tenth or twentieth week. The Division does not have on hand a supply of reliable crystal balls, so that any effort to apply the determination of eligibility for one week to the situation of later weeks could only be described as arbitrary, unreasonable, capricious and a violation of due process.

Yet, this unreasonable system is precisely what the District Court is requiring the Division to follow. The District Court held that an initial determination of eligibility has a continuing effect to ascribe eligibility for later weeks as to all issues. It ruled that a claimant once determined eligible for any week remains eligible and the Division

would have to take action to revoke that pre-existing eligibility.

The exact language of the District Court opinion is as follows:

> "Even though defendants review on a weekly basis the eligibility of a claimant, the court finds that the concept of when benefits are 'due' under the Social Security Act does not change from week to week after a claimant has been found eligible and no prior, due process hearing has been held with regard to a subsequent finding of ineligibility. The court thus finds that plaintiff Burney's benefits were 'due' and could not be summarily suspended due to a deputy's determination of ineligibility under § 52-1542a(d) [I.C., 22-4-17-2]."

This can be readily seen to be an erroneous statement of the purpose and provisions of Indiana law. Whether or not the "concept" of a claimant's application (whatever that might be) changes from week to week, a claimant's conduct surely can change over the period of unemployment. Indiana law requires that the claimant be available for work and actively seeking work each week as a condition for eligibility for unemployment compensation benefits for that week. That determination can only be made after the fact. Thus, each week's claim presents a new case for determination, and each such determination is an *initial* determination.[4] Reliance on prior weeks' decisions would clearly be improper.

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[4] As stated above, the issue of cause of termination of the prior employment is ordinarily determined only once, but the continuing effect of this determination is merely because of res judicata. Res judicata applies only to issues which were or could have been determined in the first case. There is no way that a tribunal can make a decision as to the effect of conduct in the future which conduct cannot be predicted.

B.

THE SOCIAL SECURITY ACT

The unemployment compensation program is one of the joint federal-state programs under the Social Security Act. See 42 U.S.C. §§ 501-504. Unlike some of the other programs, however, the statute is general as to what the program shall include.[5]

The statutory limitations on the program are primarily that the state plan must "be reasonably calculated to insure full payment of unemployment compensation when due," and must provide an opportunity for a fair hearing for claimants who are denied compensation. 42 U.S.C. § 503. (This section is set out in Appendix A of this brief.) The power of the Secretary of Labor, under these general provisions, however, is extensive in setting requirements for the states to follow. Thus, there is a high degree of uniformity among the state plans. It might be noted that the Indiana law had received certification from the Secretary of Labor.

The issue in this case, as respects the federal law, is whether a system of weekly initial determinations of eligibility provides "payment when due" as required by § 503 (a)(1). The problem is to find the proper method of determining when benefits are due.

It is no doubt an oversimplification merely to say that benefits are "due" to those claimants who are eligible under the approved state law. This fundamental truism must be kept in mind, however, to maintain a proper perspective. The word "due" is not a magic talisman, as the District Court apparently considered it, but merely a shorthand reference to *all the issues* of eligibility.

The method of determining eligibility on a week-to-week basis is under attack here. Yet, as shown above, that is

[5] Compare, for example, 42 U.S.C. § 606, which gives quite specific delineation of the AFDC program.

the manner by which the various states, with the approval of the Secretary of Labor, have been making the determinations—week by week.

Therefore, under the law as it both is and should be, a determination of eligibility for one week has no effect on the decision of the issues of availability, effort to secure work, etc., for any future week. In Mrs. Burney's case, the determination of whether she was available for work during the week ending March 20, 1971, for which she received benefits, was totally separate from the determination of her availability for work the week ending March 27, 1971.

No determination was ever made that Mrs. Burney was eligible for benefits for the week ending March 27, 1971. A determination was made that benefits were *not* "due" her for that week. That was the only determination made for *that week* at the time the Division acted.

C.

THE JAVA DECISION

The decision of the District Court in this case cites as authority the opinion of this Court in *California Department of Human Resources Development v. Java,* 401 U.S. 121 (1971). A consideration of the fact situation in *Java* shows that case to be no authority for the District Court in this case. Rather, the rationale of that case supports the Division herein.

In *Java,* the claimant was found to be *eligible* for benefits by the California agency. Under the law then in effect, those benefits were required to be withheld upon the filing of an appeal by the employer. No benefits were allowed to be paid a claimant until the total appellate process was complete. This Court held that the determination of *eligibility* by the agency made payments "due". The improper portion of the state law was allowing an employer to force

the withholding of benefits which would otherwise be paid by the agency.

Java raised no issues and involved no factual situation involving a continued claim. Only the initial determination was under consideration there. This case, then, involves the converse of *Java* since the determination on the issue of availability for the week in question was that payments were not "due" because Mrs. Burney was not holding herself available for work.

Java, in essence, decided that the determination of the deputy was to be accepted by the agency as its basis for action rather than the position advocated by an interested party, the employer. In unemployment compensation cases, there are three parties, the claimant, the employer, and the Division. Two of these parties clearly have an interest in the outcome of the matter; only the Division is in a position where impartiality might be likely. *Java* decided that an employer may not be given the power to overrule the deputy determination pending appeal. The issue in this case is whether a claimant shall have a corresponding right to overrule the deputy pending appeal.

The Division, being made up of human beings, does not achieve perfection; no human agency ever does. Therefore, appeal rights are provided. But an impartial deputy decision is still more reasonable than a decision by a claimant who clearly has an interest in the outcome. The same rationale that prohibited placing such power in the employer also prohibits placing the power in the claimant.

D.

THE GOLDBERG DECISION

Another matter worthy of consideration is the effect of the decision of this Court in *Goldberg v. Kelly,* 397 U.S. 254 (1970), on this case. *Goldberg* was argued by the claimant

in this case as an alternate grounds of decision. This case will be further considered in part II of this argument, relating to the nature of a due process hearing. The purpose of this section is to distinguish the programs and procedures involved. *Goldberg* involved the programs of Aid to Families with Dependent Children (AFDC) and a purely state and local level general relief program.

The first and foremost difference is that *Goldberg* involves a termination of a vested pre-determined right, while this case presents a determination on what is, both in fact and in law, an initial determination. There is no authority known for the proposition that a potential welfare recipient must be given an evidentiary hearing before an initial application can be refused.

Unemployment compensation is not a general welfare program. Three obvious differences can be noted. First, welfare programs are based strictly on need. This is not true of unemployment compensation, although the fact that unemployed people might be in need presumably was considered by Congress when instituting the program. That need is not the criterion can be seen from two different approaches. First, since there is no needs test, an unemployed person may receive compensation even though he might have ample resources to sustain himself and his family. At the other end, a person who is clearly destitute might not receive unemployment compensation when he loses a job because, for example, he had not accumulated sufficient wage credits to qualify as an "insured worker", (see p. 6, supra.), or he was terminated under circumstances which might disqualify him. (See p. 7, supra.).

A second difference, particularly relevant to this case, is that affirmative duties are placed upon recipients of unemployment compensation benefits which are not placed on recipients under welfare programs. The reason this case arose is that a claimant for unemployment compensation

benefits must show that, each week, "he is physically and mentally able to work, is available for work, and is . . . making an effort to secure work." I.C. 1971, 22-4-14-3, supra. No similar affirmative duties are placed on recipients under welfare programs.

A third difference is that the programs are different in scope in that unemployment compensation is basically a short-term program to aid persons off work only for the period of time it takes them to find work. Welfare programs are designed to meet long-term needs. Old age, blindness, and disability, for example, are conditions which are ordinarily either permanent or of long duration. The AFDC program has more variables to take into account, but the process of bringing children to age cannot be speeded up. The requirement that a parent be unavailable because of death, incapacity, or "continued absence from the home," also appears to be a long-term problem not susceptible of speedy remedy. See 42 U.S.C. § 606.

These differences were recognized by Congress when it established the unemployment compensation program.

> "Unemployment compensation differs from relief in that payments are made as a matter of right, not on a needs basis, but only while the worker is involuntarily unemployed. In all compensation systems the period during which compensation is payable is limited in some relation to the previous period of employment. Invariably there is a waiting period immediately following unemployment during which no compensation is payable. Thereafter compensation is paid as a stated percentage of the previous wage, customarily with both a minimum and maximum rate. Payment of compensation is conditioned upon continued involuntary unemployment. Beneficiaries must accept suitable employment offered them or they lose their right to compensation. After a specified period of time the compensation is discontinued in any event." Report No. 628, United

States Senate Accompanying H.R. 7260, 74th Congress, 1st Session.

See also, Report of the Advisory Counsel to the Committee on Economic Security, dated December 18, 1934 and 79 Cong. Rec. 5468 (1935) (Remarks of Representative Doughton).

These differences in the programs emphasize that the *Goldberg* rule as to termination of vested eligibility rights is inapplicable to cases involving the initial determination of whether an unemployment compensation claimant had fulfilled his affirmative duties to be available for work, etc., during a given week.

E.

THE TORRES DECISION

All these factors are brought together in consideration of *Torres v. New York Department of Labor*, supra. This was a class action involving two named claimants. The facts of Mr. Torres' case are set out above at p. 7. The facts in the case of the other named plaintiff, Mr. Dinger, are very similar to those in this case. He had received benefits for a period of time and then was found, in a periodic interview, to have failed to make a sincere effort to secure work. 321 F.Supp. at 436.

The case was tried to a three-judge court both on statutory and due process issues. The New York statute, quite similar to the Indiana law, was upheld. 321 F.Supp. 432. On appeal to this Court, the cause was remanded for further consideration in light of the decision in *Java*, which came after the District Court decision. 402 U.S. 968 (1971). Upon reconsideration, the District Court in a per curiam decision declared *Java* inapplicable to the facts of the case and again gave approval to the New York statute. 333 F.Supp. 341 (1971). That decision was affirmed by this Court. — U.S. —, 92 S. Ct. 1185 (1972).

Each of the issues in this case, plus matters not decided by the District Court in this case, were fully considered in *Torres* and a similar state law upheld. It is suggested that this case cannot be distinguished from *Torres* and should be similarly decided.

II

Even Were a Hearing Required, No Formal Evidentiary, Adversary Hearing Would be Called For

It will first be noted that 42 U.S.C. § 503(a)(3) requires that a hearing be provided. This has been interpreted, though, to mean a full, evidentiary hearing after the fact. After the determination of the Deputy (which is itself a hearing), either party has the right to demand a referee hearing. I.C. 1971, 22-4-17-2, supra. (See Appendix A to this Brief). Further appeal is then provided.

If it should be determined that a hearing is required before a determination of ineligibility on a continued claim may be made, there is still an issue as to the type of hearing required. The opinion of the District Court required only a "prior, due process hearing". The Division filed a timely Motion requesting the injunction be made more specific. (App. 34-43). This Motion was supported by an extensive memorandum. Claimant filed a Memorandum Opposing Defendant's Motion (App. 44-47). The Division's Motion was denied. (App. 48).

It is submitted that the injunction as it now stands is so vague as to be unenforceable. *Gunn v. University Committee,* 399 U.S. 383 (1970). The language used by the District Court was the requirement of a "prior, due process hearing." Due process, though, does not set up a single, unchanging standard of procedure, but requires a separate determination as to each type of situation in which the due process requirement is invoked. *Goldberg v. Kelly,* supra; *FCC v. WJR,* 337 U.S. 265 (1949). As stated in the *WJR* case:

> "The Fifth Amendment guarantees no particular form of procedure; it protects substantive rights. • • • The requirements imposed by that guarantee are not technical, nor is any particular form of procedure necessary." 337 U.S. at 275.

A comparison of the procedures suggested in the memoranda supporting and opposing the Motion to amend clearly point up the differences to be considered here.

A.

THE JAVA-TYPE PROCEEDING

This Court in *Java*, supra, dealt at some length with the hearing procedure used in California to determine initial claims. This Court noted that:

> "Although the eligibility interview is informal and does not contemplate taking evidence in the traditional judicial sense, it has adversary characteristics. . . ." 402 U.S. at 135.

In considering this issue, a fuller statement of the Indiana procedure might be useful in applying the *Java* procedure to a continued claim situation.

Each new claimant is given a Benefit Rights Interview. Indiana Employment Security Division, *Unemployment Compensation Claims Manual* (referred to herein as Manual), § 13710. A full explanation of his duties under the law is given in Manual, § 13712. Claimants are then classified as to their attachment to the labor market. Manual §§ 13720, 13723. They are given periodic interviews at set intervals. Manual, § 13725. The periodic interview deals in some depth with the claimant's eligibility. Manual, §§ 13731, 13732. During weeks when a claimant is not given a periodic interview, he will make a written certification as to the conditions of his eligibility and is given a summary interview by a claims taker. Manual § 13620.

It must be noted that in this case, as is quite common, the disqualifying information came from the claimant. Mrs. Burney stated, during such an interview, the information which led to the finding of ineligibility. (App. 32)[6] In other cases, information might come from the report on a job referral from the division or from any other source.

If the facts are evident and no employer is involved, a determination will be made immediately. Where there is a dispute, information and rebuttal is usually obtained by telephone. This is specifically required on separation issues. Manual § 17100. This Indiana procedure and the California procedure described in *Java* are basically similar.

B.

THE GOLDBERG-TYPE PROCEEDING

The decision in *Goldberg,* supra, set out certain requirements for the type of hearing required in that situation. 397 U.S. at 267-271. These were set out, and perhaps expanded, by Claimant in the Memorandum Opposing Defendant's Motion (App. 44-46). These procedures are somewhat more formal and exacting than a court trial.[7] Perhaps, however, a deferral to a referee hearing would be considered a good-faith effort to comply with such rules.

C.

THE DETERMINANTS OF DUE PROCESS

It has already been stated above that due process is a flexible standard which varies to fit the specific situation.

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[6] This determination was affirmed by a referee after a full evidentiary hearing. (App. 31). After the decision of this cause in the District Court, the Review Board reversed the referee decision. A decision of the Indiana Appellate Court, *Hacker v. Review Board,* 271 N.E.2d 191 (1971), not yet reported at the time of the referee decision, established that the circumstances of cases such as Mrs. Burney's were not grounds for a determination of ineligibility.

[7] For example, a court may take judicial notice; this would not be allowed under Claimant's proposal.

A weighing of the interests involved must be considered. *Goldberg,* supra, 397 U.S. at 262-263.

In terms of payment of monies, the Division has no interest one way or the other. The money to pay benefits comes from special taxes on employers. I.C. 1971, 22-4-10-1 et seq. There remains, then, the factor which is the interest of the Division. That is the factor of insuring that a system is instituted which will prove workable. A system that breaks down under its own weight will be to the best interest of none of the parties.

It has been emphasized throughout this brief that the determination involved is an *initial* determination of eligibility for that week as to issues such as that involved in Mrs. Burney's case. Such a determination must be made each week for every claim filed, and a hearing procedure must be used on each of those cases in which there is any suggestion of possible ineligibility. Thus, the procedure used must, while being full enough to reach a meaningful and rational decision, be summary enough that the whole system does not fall into complete chaos. A system such as that used in Indiana and most, if not all, other states meets these two criteria. *Java,* supra.

CONCLUSION

For the foregoing reasons, the decision of the District Court in this case should be reversed and remanded for entry of judgment for the Division. In the alternative, the cause should be remanded to the District Court for clarification of the procedures required under that Court's injunction.

Respectfully submitted,

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APPENDIX A

Indiana Code of 1971, 22-4-17-2

Sec. 2. (a) When an individual files an initial claim the Division shall promptly make a determination of his status as an insured worker, in a form prescribed by the board. A written notice of the determination of insured status shall be furnished him promptly. Each such determination shall be based on and include a written statement showing the amount of wages paid to him for insured work by each employer during his base period and shall include a finding as to whether such wages meet the requirements for him to be an insured worker, and, if so, the week ending date of the first week of his benefit period, his weekly benefit amount, and the maximum amount of benefits that may be paid to him for weeks of unemployment in his benefit period. For the individual who is not insured, the notice shall include the reason for the determination. Unless the individual, within ten (10) days after such determination was mailed to his last known address, or otherwise delivered to him, asks a hearing thereon before a referee, such determination shall be final and benefits shall be paid or denied in accordance therewith.

(b) The Division shall promptly furnish each employer in the base period whose experience or reimbursable account is potentially chargeable with benefits to be paid to such individual with a notice in writing of his benefit liability. Such notice shall contain the date, the name and social security account number of the individual, the ending date of his base period and the week ending date of the first week of his benefit period. Such notice shall further contain information as to the proportion of benefits chargeable to the employer's experience or reimbursable account in ratio to the earnings of such individual from such employer. Unless the employer within ten (10) days after such notice of benefit liability was mailed to his last known address, or otherwise delivered to him, asks a hearing

thereon before a referee, such determination shall be final and benefits paid shall be charged in accordance therewith.

(c) An employing unit, including an employer, having knowledge of any facts which may affect an individual's eligibility or right to waiting period credits or benefits, shall notify the Division of such facts promptly in accordance with regulations prescribed by the board.

(d) In addition to the foregoing determination of insured status by the Division, the deputy shall, throughout the benefit period determine the claimant's eligibility with respect to each week for which he claims waiting period credit or benefit rights, the validity of his claim therefor, and as the case may be the attributability to the employer of the cause for which the claimant left his work, or may refer such claim to a referee, who shall make the initial determination with respect thereto in accordance with the procedure in IC 1971, 22-4-17-3 hereof.

(e) In cases where the claimant's benefit eligibility or disqualification is disputed, the Division shall promptly notify the claimant and the employer or employers directly involved or connected with the issue raised as to the validity of such claim, the eligibility of the claimant for waiting period credit or benefits, or the imposition of a disqualification period or penalty, or the denial thereof, and of any nonattributability to the employer of the cause for which the claimant left his work, of such determination and the reasons thereof. Except as otherwise hereinafter provided in this Subsection regarding parties located in Alaska, Hawaii and Puerto Rico, unless the claimant or such employer within ten (10) days after such notification was mailed to his or its last known address, or otherwise delivered to him or it, asks a hearing before a referee thereon, such decision shall be final and benefits shall be paid or denied in accordance therewith. With respect to notice of disputed administrative determination or decision

mailed or otherwise delivered to the claimant or employer either of whom is located in Alaska, Hawaii or Puerto Rico, unless such claimant or employer within fifteen (15) days after such notification was mailed to his or its last known address or otherwise delivered to him or it, asks a hearing before a referee thereon, such decision shall be final and benefits shall be paid or denied in accordance therewith. If such hearing is denied the request therefor shall be filed with the board in writing within the prescribed periods as above set forth in this Subsection and shall be in such form as the board may prescribe. In the event that a hearing is requested, the payment of any disputed benefits with respect to the period prior to the final determination or decision shall be made only after such determination or decision. Benefits with respect to any week not in dispute shall be paid promptly regardless of any appeal.

(f) No person shall participate on behalf of the Division in any case in which he is an interested party.

(g) Solely on the ground of obvious administrative error appearing on the face of an original determination, and within the benefit year of the affected claims, the Director, or a representative authorized by the Director to act in his behalf, may reconsider and direct the deputy to revise the original determination so as to correct the obvious error appearing therein. Time for filing an appeal and requesting a hearing before a referee regarding the determinations handed down pursuant to this Subsection shall begin on the date following the date of revision of the original determination and shall be filed with the board in writing within the prescribed periods as above set forth in Subsection (c) of this Section.

42 U. S. C. § 503

(a) The Secretary of Labor shall make no certification for payment to any State unless he finds that the law of

such State, approved by the Secretary of Labor under the Federal Unemployment Tax Act, includes provision for—

(1) Such methods of administration (including after January 1, 1940, methods relating to the establishment and maintenance of personnel standards on a merit basis, except that the Secretary of Labor shall exercise no authority with respect to the selection, tenure of office, and compensation of any individual employed in accordance with such methods) as are found by the Secretary of Labor to be reasonably calculated to insure full payment of unemployment compensation when due; and

(2) Payment of unemployment compensation solely through public employment offices or such other agencies as the Secretary of Labor may approve; and

(3) Opportunity for a fair hearing, before an impartial tribunal, for all individuals whose claims for unemployment compensation are denied; and

(4) The payment of all money received in the unemployment fund of such State (except for refunds of sums erroneously paid into such fund and except for refunds paid in accordance with the provisions of section 1606(b) of Title 26), immediately upon such receipt, to the Secretary of the Treasury to the credit of the unemployment trust fund established by section 1104 of this title; and

(5) Expenditure of all money withdrawn from an unemployment fund of such State, in the payment of unemployment compensation, exclusive of expenses of administration, and for refunds of sums erroneously paid into such fund and refunds paid in accordance with the provisions of section 1606(b) of Title 26: *Provided,* That an amount equal to the amount of employee payments into the unemployment fund of a State may be used in the payment of cash benefits to individuals with respect to their disability, exclusive of expenses of administration: *Provided further,* That the amounts specified by section 1103(c) (2) of this title may, subject to the conditions prescribed in such section, be used for expenses incurred by the State for administra-

tion of its unemployment compensation law and public employment offices; and

(6) The making of such reports, in such form and containing such information, as the Secretary of Labor may from time to time require, and compliance with such provisions as the Secretary of Labor may from time to time find necessary to assure the correctness and verification of such reports; and

(7) Making available upon request to any agency of the United States charged with the administration of public works or assistance through public employment, the name, address, ordinary occupation and employment status of each recipient of unemployment compensation, and a statement of such recipient's rights to further compensation under such law; and

(8) Effective July 1, 1941, the expenditure of all moneys received pursuant to section 502 of this title solely for the purposes and in the amounts found necessary by the Secretary of Labor for the proper and efficient administration of such State law; and

(9) Effective July 1, 1941, the replacement, within a reasonable time, of any moneys received pursuant to section 502 of this title, which, because of any action or contingency, have been lost or have been expended for purposes other than, or in amounts in excess of, those found necessary by the Secretary of Labor for the proper administration of such State law.

(b) Whenever the Secretary of Labor, after reasonable notice and opportunity for hearing to the State agency charged with the administration of the State law, finds that in the administration of the law there is—

(1) a denial, in a substantial number of cases, of unemployment compensation to individuals entitled thereto under such law; or

(2) a failure to comply substantially with any provision specified in subsection (a) of this section;

the Secretary of Labor shall notify such State agency that further payments will not be made to the State until the Secretary of Labor is satisfied that there is no longer any

such denial or failure to comply. Until he is so satisfied he shall make no further certification to the Secretary of the Treasury with respect to such State: *Provided,* That there shall be no finding under clause (1) until the question of entitlement shall have been decided by the highest judicial authority given jurisiction under such State law: *Provided further,* That any costs may be paid with respect to any claimant by a State and included as costs of administration of its law.

(c) The Secretary of Labor shall make no certification for payment to any State if he finds, after reasonable notice and opportunity for hearing to the State agency charged with the administration of the State law—

(1) That such State does not make its records available to the Railroad Retirement Board, and furnish to the Railroad Retirement Board at the expense of the Railroad Retirement Board such copies thereof as the Railroad Retirement Board deems necessary for its purposes; or

(2) That such State is failing to afford reasonable cooperation with every agency of the United States charged with the administration of any unemployment insurance law.

Aug. 14, 1935, c. 531, Title III, § 303, 49 Stat. 626; June 25, 1938, c. 680, § 13(g), 52 Stat. 1112; June 30, 1939, c. 227, § 18, 53 Stat. 848; Aug. 10, 1939, c. 666, Title III, § 302, 53 Stat. 1378; 1946 Reorg. Plan No. 2, § 4, eff. July 16, 1946, 11 F.R. 7873, 60 Stat. 1095; Aug. 10, 1946, c. 951, Title IV, § 416(c), 60 Stat. 991; 1949 Reorg. Plan No. 2, § 1, eff. Aug. 20, 1949, 14 F.R. 5225, 63 Stat. 1065; Aug. 28, 1950, c. 809, Title IV, § 405(b), 64 Stat. 560; Aug. 5, 1954, c. 657, § 5(a)(1), 68 Stat. 673.